IN THE

SUPREME COURT OF THE UNITED STATES

JOHN F. DAVIS, CLERK

| | | |
|---|---|---|
| RUSSELL LASH, Warden of the Indiana State Prison, | ) | |
| Cross-Petitioner, | ) | |
| vs. | ) | NO. 1391 |
| ROY JACEY EVANS, | ) | |
| Cross-Respondent. | ) | |

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE L. SENDAK
Attorney General of Indiana

WILLIAM F. THOMPSON
Assistant Attorney General

EDWARD SQUIER NEAL
Deputy Attorney General

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: 633-5512

Attorneys for Cross-Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

| | | |
|---|---|---|
| RUSSELL LASH, Warden of the Indiana State Prison, Cross-Petitioner, | ) | |
| vs. | ) | NO. |
| ROY JACEY EVANS Cross-Respondent. | ) | |

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE L. SENDAK
Attorney General of Indiana

WILLIAM F. THOMPSON
Assistant Attorney General

EDWARD SQUIER NEAL
Deputy Attorney General

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone 633-5512

Attorneys for Cross-Petitioner

## INDEX


| | Page |
|---|---|
| Opinion Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Constitutional Provisions and Statutes Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 7 |
| I. If The Prisoner's Petition For Writ To Review An Issue Decided Adversely To Himself In The Court Of Appeals Is Granted, Then The State's Conditional Cross-Petition For A Writ To Review The Issue Decided Adversely To Itself In The Court Of Appeals Should Also Be Granted For A Full And Fair Review Of Both Of The Issues Resolved By The Court Of Appeals In Its Decision Of January 7, 1970 | 7 |
| II. Rules 2-40 And 2-40A, By Their Language, And In Their Affect And Operation, Did No More Than Provide A Constitutionally Acceptable Method For Determining Whether There Was Merit To A Pauper Appeal By Requiring The Appointment Of The Public Defender To Effect An Appeal For A Pauper Where Meritorious | 9 |
| Conclusion | 14 |
| Appendix A (Opinion And Judgment of Court of Appeals) | 1 |

Page

Appendix B (Rules Of The Indiana Supreme Court, Rules 2-40 and 2-40A) . . . . . 7

Appendix C (Public Defender's Response To Order To Show Cause In The Above-Entitled Action) . . . . . 14

Appendix D (Per Curiam Decision Of The Indiana Supreme Court, April 14, 1966) . . . . . 21

Appendix E (Public Defender's Response To Second Order To Show Cause In The Above-Entitled Action) . . . . . 24

Appendix F (Per Curiam Decision Of The Indiana Supreme Court, September 18, 1967) . . . . . 28

## CITATIONS

CASES

Anders v. California, 386 U.S. 738 . . . . . 2, 10, 12

Frazier v. Lane, 281 F. Supp. 240 (D.C. Ind.) . . . . . 12, 13, 14

In re Evans, 247 Ind. 324 . . . . . 4

Newland v. Lane, 418 F.2d 248 (7th Cir.) . . . . . 12, 13

IN THE

SUPREME COURT OF THE UNITED STATES

| | | |
|---|---|---|
| RUSSELL LASH, Warden of the Indiana State Prison, | ) | |
| Cross-Petitioner, | ) | |
| vs. | ) | NO. |
| ROY JACEY EVANS, | ) | |
| Cross-Respondent. | ) | |

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Cross-petitioner, Russell Lash, Warden of the Indiana State Prison, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on January 7, 1970, if, and only if, cross-respondent's petition for a writ regarding the same decision, separately filed in this cause, is granted.

## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A to this cross-petition.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 7, 1970. This cross-petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether former Rules 2-40 and 2-40A of the Indiana Supreme Court, providing a vehicle for the appointment of the state public defender for pauper appeal, created an obstacle to a pauper appeal for cross-respondent in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, even though the events upon which cross-respondent predicated his challenge in the lower court occured prior to this Court's decision in Anders v. California, 386 U.S. 738 (1967), and even though the public defender's finding that cross-respondent's appeal

was frivolous substantially met the requirements set out in the Anders decision.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. XIV § 1

". . . No state shall make or enforce any law . . . nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions involved in this cause are Rules 2-40 and 2-40A, Rules of the Indiana Supreme Court, and appear as Appendix B to this cross-petition.

## STATEMENT OF THE CASE

Cross-respondent, hereafter referred to as prisoner, was tried and convicted for first degree murder in a state court. Prisoner was sentenced to life imprisonment in the Indiana State Prison on May 6, 1959. Prisoner, by counsel, timely filed a motion for a new trial which was overruled by the trial court on June 2, 1959. Prisoner had 90 days from that date in which to perfect a direct appeal on the merits of his conviction to the Indiana Supreme Court. However, on June 9, 1959, prisoner was transferred from the Indiana State

Prison to the Dr. Norman Beatty Memorial Hospital where he remained until he was returned to the prison on March 28, 1963. At that time, prisoner requested the aid of the Indiana public defender who, on August 18, 1964, refused to represent prisoner.

Pursuant to Rule 2-40A, prisoner notified the Indiana Supreme Court that he had requested the aid of the Indiana public defender and been refused. The Indiana Supreme Court issued an order to the public defender to show cause why he did not represent prisoner in perfecting an appeal.

On April 1, 1966, the public defender, at that time Robert S. Baker, filed his response with the Indiana Supreme Court. (Appendix C). In his response, the public defender indicated possible bases of appeal but which upon investigation he had found to be frivolous. On the basis of the public defender's response, the Indiana Supreme Court concluded that an appeal for the prisoner would be without merit. See In re Evans, 247 Ind. 324, 215 N.E.2d 538 (1966), found at Appendix D herein.

On August 4, 1966, prisoner filed an application for Writ of Habeas Corpus in the District Court for the Northern

District of Indiana. The district court denied prisoner's petition in an unreported decision. Subsequently, prisoner again initated a show cause proceeding against the public defender in the Indiana Supreme Court under Rule 2-40A. The public defender, this time Mel S. Thornburg, conducted an independent investigation of his own and responded to the Court on March 22, 1967. (Appendix E). The public defender investigated possible avenues as grounds for appeal for prisoner. Upon completion of his investigation, the public defender concluded that an appeal for the prisoner would be frivolous. After examination, the Indiana Supreme Court concurred in an unreported decision. (Appendix F).

Prisoner returned to the district court for relief claiming he had been denied his constitutional right to an appeal. On June 18, 1967, the District Court for the Northern District of Indiana denied prisoner's application for habeas corpus relief. On July 12, 1968, the district court denied prisoner's petition for a Certificate of Probable Cause. Subsequently, prisoner applied to the United States Court of Appeals for the Seventh Circuit for a Writ of Certiorari to the district court. The Court of Appeals retained jurisdiction of prisoner's writ, but on October 24, 1968, the Court

of Appeals directed prisoner to reapply to the district court for a Certificate of Probable Cause. Prisoner reapplied to the district court for a Certificate of Probable Cause which was denied for a second time by the district court on November 14, 1968. Subsequently, prisoner's petition for a Certificate of Probable Cause to the Court of Appeals was granted on February 11, 1969, and pauper counsel was appointed to represent prisoner in appeal.

After prisoner's brief was filed in the Court of Appeals, but before the State's brief was filed, the Indiana Supreme Court enacted new provisions for post-conviction relief, Rules PC 1 and PC 2 superseding Rules 2-40 and Rule 2-40A, effective August 1, 1969. The State filed a motion to dismiss the appeal setting up Indiana's new Post Conviction Remedies, Rules PC 1 and PC 2, and comity as grounds. The Court of Appeals, on September 2, 1969, directed the State to file a brief on the merits, indicating that the State's motion to dismiss would be taken with the case at the time of oral argument.

The Court of Appeals, on January 7, 1970, issued its decision affirming the decision of the district court denying

habeas corpus relief without prejudice to prisoner's right to assert a claim for federal relief after he had fully exhausted his available state post-conviction remedies. Rather than speculate on what meaning the Indiana Supreme Court intended to give Rules PC 1 and PC 2, and while recognizing general priciples of comity, the Court of Appeals found that the prisoner had not exhausted all of his available state remedies because prisoner might be able to secure his desired relief under the new Indiana Post Conviction Rules. Nevertheless, the Court of Appeals also held that Rules 2-40 and 2-40A had created an additional obstacle to appeal for prisoner in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

## REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION FOR WRIT

### I

IF THE PRISONER S PETITION FOR WRIT TO REVIEW AN ISSUE DECIDED ADVERSELY TO HIMSELF IN THE COURT OF APPEALS IS GRANTED, THEN THE STATE'S CONDITIONAL CROSS-PETITION FOR A WRIT TO REVIEW THE ISSUE DECIDED ADVERSELY TO ITSELF IN THE COURT OF APPEALS SHOULD ALSO BE GRANTED FOR A FULL AND FAIR

REVIEW OF BOTH OF THE ISSUES RESOLVED BY THE COURT OF APPEALS IN ITS DECISION OF JANUARY 7, 1970.

There were two issues before the Court of Appeals. First, whether Rules 2-40 and 2-40A operated to deny prisoner his constitutional right to the equal protection of the law. Second, whether, notwithstanding the unconstitutionality of Rules 2-40 and 2-40A, the prisoner should be first required to pursue the relief afforded by Indiana's newly enacted Post Conviction Rules, Rules PC 1 and PC 2, which became effective during the pendency of prisoner's appeal to the Court of Appeals.

The Court of Appeals held that prisoner must first pursue relief under Rules PC 1 and PC 2 in the state courts before prisoner was entitled to federal habeas corpus relief. It is the decision of the Court of Appeals on this issue, and this issue alone, for which the prisoner seeks review in this Court.

With respect to the second issue, the decision of the Court of Appeals can only be read to have held that Rules 2-40 and 2-40A operated to deny the prisoner the Equal Protection of law of the Fourteenth Amendment to the Constitution of the United States. Should this Court grant prisoner's

petition for a writ in this cause and reverse the decision of the Court of Appeals regarding the available state remedies issue, the prisoner would be entitled to federal relief because the Court of Appeals impliedly, but not expressly, held that the prisoner had previously been deprived of his constitutional rights under Rules 2-40 and 2-40A. However, if the petition and cross-petition are granted in this cause and the state prevails on the Rules 2-40 and 2-40A issue, then regardless of this Court's decision with respect to the issue urged by the prisoner, the prisoner would be entitled to no federal relief at this time, but could still pursue state relief under the new Indiana Rules for post-conviction relief. Rules PC 1 and PC 2.

Thus, if the prisoner's petition is granted, then the State's cross-petition should be granted to afford all parties a full review of all questions before the Court of Appeals below.

II

RULES 2-40 AND 2-40A, BY THEIR LANGUAGE, AND IN THEIR AFFECT AND OPERATION, DID NO MORE THAN PROVIDE A CONSTITUTIONALLY ACCEPTABLE METHOD FOR DETERMINING WHETHER THERE WAS MERIT TO A PAUPER APPEAL BY REQUIRING THE APPOINTMENT OF THE PUBLIC DEFENDER

TO EFFECT AN APPEAL FOR A PAUPER WHERE MERITORIOUS.

This Court has never held that each and every indigent convicted of a crime was entitled to an appeal under any and all circumstances. This Court has held that the Constitution requires no more than that counsel conscientiously examine an indigent's case for the purpose of discovering grounds for an appeal. Anders v. California, 386 U.S. 738 (1967). In Anders, this Court dictated the procedure to be followed in appointing counsel for pursuing indigent appeals. Rules 2-40 and 2-40A, rather than create an unconstitutional obstacle as declared by the Court of Appeals, were designed to, and did in fact, trigger a procedure such as this Court prescribed in Anders.

Rule 2-40A requires the state public defender to represent indigents in obtaining post-conviction relief if requested to do so and if, after diligent inquiry, any grounds can be found to do so. If, however, the public defender refuses, then Rule 2-40A provides that:

> ". . . upon petition filed in the clerk's office of the Supreme Court setting up such facts that the public defender has failed or refused to represent them, a citation shall be issued to the public defender by this court to show cause why he does not represent the petitioner, and he shall file his response and report with the clerk of this court, which shall become a part of the record in this cause. Upon due consideration of said response and report, the court

shall determine whether or not an order shall issue requiring the public defender to represent the petitioner."

From 1963 to 1967, the prisoner was in almost constant communication with the office of the public defender. On two occasions, the prisoner requested the Indiana Supreme Court to order the public defender to show cause why he would not take an appeal for the prisoner. On two occasions, once in 1966 and once in 1967, the Indiana Supreme Court did in fact order the public defender to show cause why he did not take an appeal for the prisoner. On each occasion, the public defender conscientiously examined the prisoner's case to discover some ground upon which to maintain an appeal for the prisoner. Parenthetically, in each instance the public defender was a different individual. The public defender in the first instance was Robert S. Baker and the public defender in the second instance was Mel B. Thornburg. In each instance, the public defender responded to the Indiana Supreme Court's order. In each instance, the public defender suggested possible grounds for appeal. In each instance, the public defender submitted that the only possible grounds for appeal were in fact frivolous. Again parenthetically, the avenues pursued

by each public defender were not the same in each instance. In each instance, the Indiana Supreme Court reviewed the facts of the case and the public defender's response, concluded that an appeal would be frivolous and refused to order the public defender to take an appeal for the prisoner.

All of these proceedings in the Indiana Supreme Court transpired prior to this Court's decision in Anders v. California, supra. Even if this court were to apply Anders retroactively, the conclusion is inescapable that the proceedings in the Indiana Supreme Court under Rules 2-40 and 2-40A accorded prisoner the full limits of his constitutional rights under the decisions of this Court. The error of the United States Court of Appeals for the Seventh Circuit regarding the operation of Rules 2-40 and 2-40A is found in its reliance on the cases of Newland v. Lane, 418 F.2d 143 (7th Cir. 1969), and Frazier v. Lane, 282 F Supp. 240 (D.C. Ind. 1968). In Newland, the Court said that

> "... The actual affect of Rule 2-40A is to create an additional obstacle for an indigent in the event the public defender refuses to assist him in filing his belated motion for a new trial." at p. 145.

This was pure dictum. The facts in Newland were exactly reversed from the facts in this case. Newland claimed that

Rule 2-40A provided an indigent with a review on the merits in the Indiana Supreme Court because of the way in which the Rule operated. Newland claimed that since he was not an indigent, he was not entitled to the benefits of Rule 2-40A and that consequently he was being denied the equal protection of the law. The Court denied Newland habeas corpus relief. The Court's declaration, quoted above, was not in fact necessary to resolve the issues in the Newland case. Thus, the passage quoted above was dictum and hardly served as authority for the Court's decision in this cause.

Similarly, the case of Frazier v. Lane, supra, fails to solidly support the decision of the Court of Appeals in this cause. Sometime after the statutory period for appeal had expired, Frazier petitioned the trial court to provide him with the transcript. When the trial court denied his request, Frazier filed a petition for a writ of error coram nobis in the trial court alleging, inter alia, inadequacy of representation. That too was denied. Proceeding under Rule 2-40A, Frazier requested the aid of the public defender. When the public defender refused, Frazier requested the Indiana Supreme Court to order the public defender to show cause why he would not represent Frazier in the Indiana Supreme Court. In

response, the public defender submitted a "no merit" letter of the variety condemned in Anders v. California, supra, to the Indiana Supreme Court indicating his personal disagreement with the decisions of this Court intermingled with declarations regarding the lack of substance to Frazier's claims. The Indiana Supreme Court did not order the public defender to represent Frazier. Recognizing the inadequacy of the public defenders "no merit" letter, the district court granted habeas corpus relief. Frazier was entitled habeas corpus relief solely because the public defender in that case had not conscientiously examined the facts leading up to Frazier's conviction. This case differs significantly from Frazier, supra, in that the facts of this prisoner's case have been thoroughly and completely reviewed by at least two public defenders on at least two separate occassions. Rules 2-40 and 2-40A simply did not operate to deprive this prisoner of his constitutional right to the equal protection of the law.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit regarding the constitutionality

of Rules 2-40 and 2-40A, if, and only if, this Court issues a Writ of Certiorari to review the same judgment and opinion of the Seventh Circuit requiring exhaustion of remedies available under Rules PC 1 and PC 2.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

WILLIAM F. THOMPSON
Assistant Attorney General

EDWARD SQUIER NEAL
Deputy Attorney General

Counsel for Cross-Petitioner

UNITED STATES COURT of APPEALS

FOR THE SEVENTH CIRCUIT

---

No. 17431
ROY JACEY EVANS,

Petitioner-Appellant,

v

WARD LANE, Indiana State Prison, succeeded by Russell Lash since this cause was initiated,

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

---

JANUARY 7, 1970

---

KERNER, Circuit Judge Petitioner appeals from the denial, without a hearing, of his Habeas Corpus Petition, brought pursuant to 28 U.S.C. §2254 On appeal petitioner asserts two independent grounds for relief First, it is urged that the case be remanded for a hearing to determine whether the petitioner knowingly and intelligently waived his constitutional right to a full direct appeal. Second, it is urged that the

Indiana post-conviction procedures contained in Indiana Supreme Court Rules 2-40 and 2-40A (footnote omitted) are violative of the equal protection and due process clauses of the fourteenth amendment, and that petitioner, an indigent, should be provided with a full transcript of all proceedings in his case and an attorney to pursue his rights in an attempt to obtain a belated appeal.

Petitioner was convicted on April 28, 1959, of first degree murder and was sentenced to life imprisonment on May 6, 1959. Under Indiana law, petitioner had ninety days from June 2, 1959, to file an appeal, but on June 9, 1959, the petitioner was transferred from Indiana State Prison, where he had been taken after sentencing, to a State mental institution in Westville, Indiana. No steps were taken to perfect a direct appeal from the petitioner's conviction. The petitioner remained in the institution until March 28, 1963, a period of almost four years, and then returned to Indiana State Prison, where he is presently incarcerated.

Rules 2-40 and 2-40A of the Indiana Supreme Court require the public defender to represent an indigent prisoner in his attempt to secure a belated appeal if he finds any grounds upon which to sustain such proceeding. If the public defender

refuses to provide such representation, because an appeal would be without merit, the Indiana Supreme Court may, after submission of a petition by the prisoner and a report by the public defender, order the public defender to provide the requested assistance. In such a proceeding before the Indiana Supreme Court, the petitioner acts pro se and is not entitled to a transcript of the trial, has no counsel appointed to represent him in this attempt to receive a belated appeal, and is then in the same situation as a defendant who is solvent and has retained a private lawyer to represent him, and is able to purchase a transcript.

Consequently, Indiana Post-Conviction Rules 2-40 and 2-40A have been held to "create[] an additional obstacle for an indigent in the event the public defender refuses to assist him . . . ." Newland v. Lane (No. 17740, 7th Cir., Nov. 10, 1969), violative of the equal protection clause of the fourteenth amendment. See Frazier v. Lane, 282 F. Supp. 240 (N.D. Ind. 1968).

Any kind of screening procedure by which an indigent defendant such as petitioner herein must first run the gauntlet of a preliminary showing of merit before

a person who at best stands in the position of amicus curiae, clearly does not come up to the standard demanded by the equal protection clause The deficiency is not solved by allowing the Indiana Supreme Court to review the response and report of a public defender who has refused representation of an indigent defendant for the reason that there has been no representation by one acting as an active advocate' 282 F. Supp. at 245

Subsequent to petitioner's appeal to this court, however, the Indiana Supreme Court passed new rules to provide for post-conviction relief. The new Indiana post-conviction rules entitled PC-1 and PC-2, (footnote omitted) effective August 1, 1969, provide in pertinent part that, "Upon receiving a copy of the petition including an affidavit of indigency the Public Defender shall serve as counsel for petitioner." PC-1 §9

Petitioner asserts, however, that PC-1 and PC-2 do not afford him adequate review and suffer from the same constitutional infirmities as the old post-conviction rules 2-40 and 2-40A Petitioner contends that PC-1 and PC-2 are unconstitutional because the new rules do not afford him access to a

transcript of his trial as a matter of right, and that the only method by which he could receive such transcript would be if the public defender chose to exercise his discretion and requested one. In addition, although the petitioner admits the literal language of PC-1 §9 requires the public defender to represent all indigents, he questions whether PC-1 §9 will be interpreted in accordance with its literal language. (footnote omitted)

In the absence of any Indiana state court interpretation of PC-1 and PC-2, it would be presumptuous of this court to speculate on what meaning the Indiana Supreme Court intended to give to PC-1 and PC-2. Principles of federalism require that the Indiana Court initially interpret its own post-conviction rules.

> [N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fully open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. [citations omitted]

Harrison v. N.A.A.C.P., 360 U.S. 167, 176 (1958).

Consequently, pursuant to the new Indiana Post-Conviction

Rules, petitioner may be able to secure his desired relief. Because the new rules may provide such relief, we find that petitioner has not exhausted all of his available state remedies as required by 28 U.S.C. §2254. See Case v. State of Nebraska, 381 U.S. 336 (1965); Petition of Barry, 388 F. 2d 592 (3d Cir. 1965); Worley v. Swenson, 386 F. 2d 186 (8th Cir. 1967).

Petitioner should attempt to obtain relief under PC-1 and PC-2, at which time such rules would be interpreted. If petitioner is denied relief he would have exhausted his remedies and may then file a §2254 petition and raise, in light of an Indiana Court interpretation, constitutional challenges to PC-1 and PC-2, and any other claims for federal relief.

Mr. Ronald I. Sklar, a reputable member of the Illinois Bar, was appointed by the court to represent defendant on this appeal pursuant to the Criminal Justice Act of 1964. We thank him for his excellent professional service.

Accordingly, the decision of the district court denying petitioner's Writ of Habeas Corpus is affirmed without prejudice to the appellant's right to assert a claim for federal relief after he has fully exhausted his available state post conviction remedies.

# APPENDIX B

## RULES OF THE INDIANA SUPREME COURT

Rule 2-40

Hereafter no court shall have jurisdiction to entertain any action for a writ of error coram nobis in any criminal case, but the remedy heretofore granted in such a proceeding shall hereafter be obtained solely through a motion for a new trial in the case out of which the cause therefore is alleged to have originated. Each ground shall be separately specified in the motion for a new trial, and any ground or error not so specified shall be considered waived.

Trial counsel representing a defendant or the defendant pro se shall in all cases where meritorious grounds exist therefor, file a motion for a new trial within the time limited by the rules of this court. If no timely motion for a new trial is filed by a defendant, trial counsel or the defendant pro se, it may be considered as evidence by the court that no meritorious grounds exist for a new trial or for an appeal, or if any meritorious grounds did exist, there is an acquiescence to; and an acceptance of, the judgment of the trial court by the defendant.

The limitations with reference to motions for a new trial shall be applicable hereto. Provided, however, if

## APPENDIX B

## RULES OF THE INDIANA SUPREME COURT

Rule 2-40A

Rulings on petitions to file belated appeals, rulings on petitions to file belated motions for a new trial and rulings on belated motions for new trial (when because of the expiration of time it is impossible to incorporate the alleged errors in a regular appeal in the original criminal case), may be reviewed only on petition for writ of certiorari in the Supreme Court of this state.

A petition for a writ of certiorari shall be verified, shall set forth specifically the grounds therefor and may be supported by a brief. A copy of the petition and brief shall be served on the attorney-general at the time of filing. To this petition the attorney-general shall file a response under oath admitting, denying or stating additional facts (by affidavit or otherwise) pertaining to the issue involved, together with brief in support thereof. If there is a conflict as to the statement of the record below, this court may direct the clerk below to prepare a certified copy of that portion of the record in dispute and file the same in this court.

If the conflict concerns the evidence, the trial court may be directed to recite in narrative form the evidence pertinent to the issue and certify to the same as a bill of exceptions containing all of the evidence pertaining to the issue involved.

It shall be the duty of the public defender of the state of Indiana to represent indigent persons who are inmates of penal institutions of the state of Indiana after their time for regular or timely appeal has expired, if requested so to do, in the filing of petitions for delayed appeals, petitions for belated motions for a new trial, and petitions for writs of certiorari if he, after diligent inquiry, finds any grounds upon which to sustain such proceedings. In the event of the failure or refusal of the public defender to represent any petitioner in such cases (as provided in Rule 2-40A, supra), upon petition filed in the clerk's office of the Supreme Court setting up such facts that the public defender has failed or refused to represent them, a citation shall be issued to the public defender by this court to show cause why he does not represent the petitioner, and he shall file his response and report with the clerk of this court, which shall become a part of

the record in this cause. Upon due consideration of said response and report, the court shall determine whether or not an order shall issue requiring the public defender to represent the petitioner.

In the event proceedings are in forma pauperis, no costs shall be taxed against petitioner for transcripts, bills of exceptions and certified copies of the record in such case; otherwise the costs shall be taxed as provided by law.

The petition and brief for writ of certiorari shall be filed within sixty [60] days after the ruling complained of, and the response thereto within thirty [30] days after the filing of the response. No other briefs or pleadings shall be filed. Six [6] copies of the petition and brief, and response and the reply brief shall be filed with the clerk.

The court may grant the writ if it finds meritorious grounds for a review of the trial court's action exist, and make such order, final or otherwise, as may be appropriate.

Provided further, that where the petition for the writ does not meet with the rules of this court, the same may be

denied under the same circumstances, conditions and for the same reasons given, if any, by the United States Supreme Court in denying like petitions.

This rule shall be applicable only to criminal proceedings. (Adopted Sept. 25, 1953, effective in cases filed after Jan. 1, 1954; amended and in force Sept. 11, 1963).

APPENDIX C

IN THE

SUPREME COURT OF INDIANA

IN RE: ROY JACEY EVANS, )
)
Petitioner )

No. 0-765

PUBLIC DEFENDER'S RESPONSE TO ORDER TO SHOW CAUSE IN THE ABOVE-ENTITLED ACTION

APRIL 1, 1966

That the above-named petitioner, Roy Jacey Evans, filed his petition in the Supreme Court of Indiana, requiring the Court to issue an order to the Public Defender to Show Cause why the Public Defender has refused the petitioner's request to pursue remedies as provided by Supreme Court Rules 2-40 and 2-40A, and in particular to file in petitioner's behalf a belated motion for new trial, and a belated appeal, and/or a petition for writ of certiorari.

That in response to said petition, the Supreme Court of Indiana, issued its order on January 31, 1966, to the Public Defender of Indiana, to show cause why he should not represent petitioner in a post-conviction appeal.

That in response to said order, the Public Defender

shows to the Court the following facts and law applicable thereto:

That on the 2nd day of January, 1959, during the evening thereof, in the County of Clark, State of Indiana, the petitioner visited the home of Elmer Jackson, and both had been drinking and an argument and altercation took place between the petitioner and the said Elmer Jackson, resulting in the petitioner inflicting injuries on the head of the said Elmer Jackson, from which injuries he died two days afterward, and from the coroner's inquest, it was found that the decedent's death was caused by massive intracerebral contusion with massive intracranial hemorrhage resulting from trauma. That after said argument the petitioner left the home of Elmer Jackson and returned to his own home which was a short distance away and went to bed, and the next morning another person visiting at the home of Jackson, found him lying in a pool of blood, and the police were called resulting in the arrest of the petitioner and he was taken to the police station the same morning which was the 3rd day of January, 1959, and interrogated by the police regarding the injuries that Elmer Jackson had received, and the petitioner signed

a statement to the effect that he and Jackson had an argument and some blows were struck by both parties and the petitioner admitted that he knocked Jackson to the floor and kicked him in the head and stomped on him, a copy of said statement is enclosed herewith and made a part of this report, and marked Exhibit "A". That on the following date, the same being the 4th day of January, 1959, the said Elmer Jackson died as the result of multiple fractures of his skull, inflicted by someone, and from the statement of the petitioner, he inflicted the injuries.

That thereafter, on the 8th day of January, 1959, the coroner of Clark County, conducted an investigation of the death of Elmer Jackson, and at that time the petitioner claimed that he beat Jackson over the head with a water pipe but did so in self-defense.

That I secured a copy of the coroner's inquest that was held on the 8th day of January, 1959, and within four days after the death of Mr. Jackson, at the inquest the petitioner was represented by his counsel, Mr. Varble, and the petitioner was afforded every legal and constitutional right during the hearing. I have not incorporated in this report a copy of the coroner's inquest because it is very volum-

inous, nevertheless, if the Court believes that it should be made a part of my report, I will be glad to comply.

The corpus delicti was well established by the fact that the said Elmer Jackson died from injuries inflicted on his head by someone and the petitioner admitted that he inflicted the injuries but did so in self-defense.

The petitioner was indicted for First Degree Murder, in the Clark Circuit Court, and he was defended by the Public Defender of Clark County, Mr. David P. Varble, Jr., a reputable and competent attorney of Clark County, and as a result of a jury trial, the petitioner was found guilty of first degree murder and sentenced to life imprisonment.

Under date of May 1, 1959, my office received a letter from said Attorney, wherein he stated that Roy Jacey Evans, the petitioner herein, was tried and convicted on April 28, 1959, of Murder in the First Degree, and that he, said Attorney, advised the defendant and the defendant's parents that there was no serious points upon which to take an appeal, and inquired of our office whether or not we would be interested in taking an appeal for the petitioner, a copy of which letter is enclosed herewith and made a part of this report, and marked Exhibit "B." In response thereto,

said attorney was notified that my office does not take timely appeals, and that if he did not believe there was any merit to an appeal, he would be justified in refusing to file a motion for a new trial or to take an appeal.

Nothing more was heard from the petitioner, his counsel, or any of his relations, and on or about June 25, 1963, or more than four years after his conviction, at which time the petitioner requested our office to make an investigation and and to intercede for and on his behalf. The Public Defenders office did make an investigation and wrote several letters to the petitioner regarding his case and finally, under date of August 18, 1964, definitely notified petitioner that we could not find any merit that would justify our actions on his behalf, copies of said letters to the petitioner from my office are incorporated in his petition filed in the Supreme Court, and marked Exhibits 'A' 'B' and 'C,' the same being incorporated in this report by reference and made a part hereof.

I personally went to Jeffersonville, Indiana, to investigate the facts of the case, to see whether or not I could find any newly discovered evidence that might justify our

office taking any action in the case and personally talked to the police department, and to defense counsel, and defense counsel informed me that in his opinion there was no error in the trial that would justify a motion for a new trial or an appeal.

That from all of the facts of the case, I found that without question, the petitioner killed the decedent by either kicking his head to such an extent that it resulted in multiple fractures of his skull, or that the petitioner beat the decedent over the head with a water pipe causing the death of the decedent, and that the defense on the part of the petitioner was that he acted in self-defense. The jury did not believe that the petitioner acted in self-defense, and found him guilty of First Degree Murder.

It is well established law of Indiana, that when self-defense is offered by a defendant to justify homicide, that the question of self-defense is an ultimate fact solely for the determination of the jury from the evidence in the case. Robinson v. State, 243 Ind. 192-198 (1962); Swift v. State, (1961) 242 Ind. 87-90, and cases therein cited.

That it is well established law of Indiana, that if

trial counsel fails to file a timely motion for new trial or perfect a timely appeal, the grounds for any appeal would have to be based on matters de hors the record, or in other words, newly discovered evidence that would be neither impeaching or cumulative, and the Public Defender from a very thorough and careful investigation has failed to find any evidence that could be the basis for a delayed motion for a new trial or a delayed appeal, and therefore, the Public Defender is unable to pursue any post-conviction remedies that may exist in Indiana, for and on behalf of petitioner.

Respectfully submitted,

Robert S. Baker
Public Defender
State of Indiana

APPENDIX D

IN THE

SUPREME COURT OF INDIANA

IN RE: ROY JACEY EVANS, )
)
Petitioner )

No. 0-765

PER CURIAM DECISION OF APRIL 14, 1966

Petitioner was charged with first-degree murder and found guilty by a jury. He filed his petition under Rules 2-40 and 2-40A of this court on May 5, 1965, requesting the that the Public Defender show cause why he should not represent the petitioner. The Public Defender filed his response on April 1, 1966.

Petitioner alleges that he is an inmate of the Indiana State Prison at Michigan City, Indiana; that time for regular appeal has expired; that on three occasions he requested assistance from the Public Defender under Rules 2-40 and 2-40A; that the Public Defender indicated possible lines of investigation in two letters to petitioner; that thereafter the Public Defender refused to represent petitioner; that petitioner is proceeding as a pauper.

In the Public Defender's response it is clear that his office has reinvestigated this case to determine whether there is any newly-discovered evidence that would justify him in taking action in this case.

Petitioner during trial admitted the killing, but pleaded not guilty by reason of self-defense. As the Public Defender appropriately states at page 4 of his response:

> "The jury did not believe that the petitioner acted in self-defense, and found him guilty of First Degree Murder."

[1] As the Public Defender asserts, it is a question for the sole determination of the jury as to whether self-defense justifies a killing. Robinson v. State (1962), 243 Ind. 192, 184 N.E.2d 16; Swift v. State (1961), 242 Ind. 87, 176 N.E.2d 117.

[2] The petitioner, in paragraph 4 of his petition, states that Mr. Sid Cleveland of the Public Defender's office twice wrote him, indicating possible lines of investigation. It could be inferred from this that the Public Defender, while telling petitioner of lines of investigation, did not pursue said investigation. However, the evidence shows that the Public Defender did pursue such investigation. We quote

from page 4 of the Public Defender's response:

> "I [Robert S. Baker, Public Defender] personally went to Jeffersonville, Indiana, to investigate the facts of the case, to see whether or not I could find any newly discovered evidence that might justify our office taking any action in the case and personally talked to the police department, and to defense counsel, and defense counsel informed me that in his opinion there was no error in the trial that would justify a motion for a new trial or an appeal.
>
> "That from all of the facts of the case, I found that without question, the petitioner killed the decedent by either kicking his head to such an extent that it resulted in multiple fractures of his skull, or that the petitioner beat the decedent over the head with a water pipe causing death of the decedent, and that the defense on the part of the petitioner was that he acted in self-defense. The jury did not believe that the petitioner acted in self-defense, and found him guilty of First Degree Murder."

For these reasons, petitioner's petition is denied.

APPENDIX E

IN THE

SUPREME COURT OF INDIANA

IN RE: ROY JACEY EVANS, )
)
Petitioner )

No. 0-765

PUBLIC DEFENDER'S RESPONSE TO SECOND ORDER TO SHOW CAUSE IN THE ABOVE-ENTITLED ACTION

MARCH 22, 1967

Re: Roy Jacey Evans 0-765

Dear Mrs. Huffman:

In response to your memo concerning the above named individual, please be advised that I have made another investigation of the facts of the case and that I find no merit in the second petition to cite the office of Public Defender. Although the second petition is longer and in more detail, it presents no new problem and contains no newly discovered evidence that could form the bais of a belated appeal.

The records of the Court show that Robert S. Baker and Sid M. Cleveland made a thorough investigation of this case in 1965 and reported to the Court on April 14, 1966 denied petitioner any relief.

In petitioner's second petition he stresses the allegation of police brutality and long hours of interrogation which are missing in the first petition. It would appear they are an after thought being used to get back into Court when no proper evidence is available. The Public Defender has a copy of the Coroner's Inquest, which is quite lengthy, and only a small portion of it is included herein to show the complete lack of any evidence or mention of any irregularity in police procedure.

The Coroner's Inquest minutes show that the petitioner was represented by counsel; that counsel was with him; that petitioner was advised of his constitutional rights at that time; that he admitted striking the deceased with an iron pipe and that he left him in an unconscious condition. It was the contention of the defendant that he acted in self-defense. This the jury did not believe. The law is well settled in Indiana that when self-defense is offered by a defendant to justify homocide, the question is an ultimate fact solely for the determination of the jury from the evidence in the case. Robinson vs State 243 Ind 192. Swift vs State 242 Ind. 87.

The petitioner now makes the allegation that he was legally insane at the time of the trial; that he couldn't assist his counsel and that he has no memory of the events surrounding the crime. It is true the defendant was removed to Norman Beatty Hospital on the 9th day of June, 1959, approximately five months after the homocide was committed and that he was not released until the 28th day of March, 1963. It should be noted that no special plea of insanity was ever made; that the defendant was very lucid and described in great detail his actions on the night of January 2, 1959; what he ate and drank, what groceries he bought; who he spoke to; what kind of wine he bought and how much he paid for it.

There is no question in the mind of this writer that the defendant was laboring under some unsoundness of mind at the time of the crime and that in the ensuing five months the pressures of jail, trial, conviction and thought of death by electricity or life imprisonment made his mind deteriorate. I interviewed the petitioner at Indiana State Prison on the 16th day of February, 1967 and he is still emotionally disturbed to the point that the petitioner was handcuffed and accompanied

by a guard who remained with him all during the interview. The interview was very unsatisfactory and it became apparent that the petitioner is suffering from a persecution complex. When I told him I could not help him he became so incensed that he begged the guard to remove the handcuffs so he could do me bodily harm.

The petitioner is a 35 year old, small, negro man of scant education and dull mentality who got drunk and killed another negro. No doubt he has had assistance from the "writ room lawyers" and it is submitted that no action be taken against him for the frivilous pleadings as happened in the case of State ex rel Sinclair vs Marion Co. Criminal Court 203 NE2 673. I am not certain that others of us with much greater advantages would do differently than he.

Respectfully submitted,

Mel B. Thornburg
Public Defender

APPENDIX F

IN THE

SUPREME COURT OF INDIANA

IN RE: ROY JACEY EVANS, )
)
Petitioner )

No. 0-765

PER CURIAM DECISION OF SEPTEMBER 18, 1967

On March 8, 1967 petitioner filed his second petition to cite the Public Defender to show cause, if any, why he does not represent the petitioner. This petition differs from the one which was denied April 14, 1966 only in that it makes specific allegations of error alleging police brutality and that petitioner was not represented at the coroner's inquest by counsel. The Public Defender on each of these petitions has made a thorough investigation and report to the court that there is no merit to petitioner's complaints.

Further the minutes of the coroner's inquest show that petitioner was represented by counsel; that counsel was with him; that petitioner was advised of his constitutional rights at that time; that he admitted striking the deceased with an iron pipe and that he left him in an unconscious

condition. Defendant contended he acted in self defense; however the jury found him guilty of first degree murder and sentenced him guilty of first degree murder and sentenced him to life imprisonment.

It is clear that the petitioner's statements in the second petition are untrue. This petition is denied.